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No. 98-1046

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BELLSOUTH CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. Section 274 Violates the Bill of Attainder Clause and the Separation of Powers.

1. The Government does not defend what the Court of Appeals actually held in this case. First, the Court of Appeals held that 47 U.S.C. § 274 could be analyzed "apart from its specific targeting aspect." App. 14a. Only by assuming away this critical aspect of the statute was the Court of Appeals able to conclude that Section 274 "is nothing more than a line-of-business restriction, comparable for example to the Glass-Steagall Act's limitation on the entry of commercial banks into investment banking or to the cross-ownership restrictions on broadcasters upheld in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978)." App. 12a. Under this approach, Congress could single out a particularly disfavored defense contractor, or software company, or firearms manufacturer, and subject that entity — alone and by name — to legislative abuse so long as the same rule *might have been* applied across-the-board to all similarly situated parties. The Government's claim that such line of business restrictions are "a legal commonplace" (Govt. Opp. 10) ignores the fact that these restrictions are invariably *general* prohibitions regulating an open, objectively defined class identified by neutral characteristics (whether a business is a national bank, for example) — not regulating according to a list of names which no one can ever leave and no other person can ever join.

Similarly, the Government makes no serious attempt to defend the Court of Appeals' holding that the "most important" question is whether Section 274 could "reasonably be said to further nonpunitive legislative purposes." App. 13a; *see also id.* at 17a (whether "the distinction drawn by Congress seems . . . understandable without resort to inferences of punitive purposes"). The test, according to the D.C. Circuit, is whether "Congress [can] rationally be said to have pursued nonpunitive purposes in enacting § 274." App. 15a.

The Government cannot deny that this holding is directly contrary to this Court's decisions in *United States v. Brown*, 381 U.S. 437, 456-58 (1965), and *Nixon v. Administrator of General Services*, 433 U.S. 425, 476 n.40 (1977). Virtually any Bill of Attainder can be justified by appeal to a regulatory purpose; indeed, the more extensive the trial by legislature, the more rational the resulting attainder will appear to be. This Court has never held that a form of punishment falling within the "checklist of deprivations and disabilities" that includes line-of-business limitations (*Selective Service System v. Minnesota PIRG*, 468 U.S. 841, 852 (1984); *Nixon*, 433 U.S. at 473-74) can be salvaged by a judicial finding that the statute serves a legitimate regulatory purpose. Instead, this Court has held that "[a] statutory enactment that imposes any of those [checklist] sanctions on named or identifiable individuals would be immediately constitutionally suspect." *Nixon*, 433 U.S. at 473. In both *Nixon* and *Selective Service System*, this Court did not even inquire into "whether the challenged statute [could] be reasonably said to further nonpunitive goals" (*Selective Service System*, 468 U.S. at 854) until it determined that the disabilities imposed by the challenged statute were not among the "forbidden deprivations" contained in the historical checklist. *Nixon*, 433 U.S. at 475; *see also Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1263 (3d Cir. 1996) (Becker, J.) ("even if some remedial purpose can fully explain the measure," a law is punitive if "a historical analysis shows that the measure has traditionally been regarded as punishment"). The framers were thoroughly familiar with allegedly "regulatory" Bills of Attainder. The anti-Tory laws passed during the Revolution — which the Bill of Attainder clause was adopted to prevent — were justified on just such a basis.[1]

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[1] During the American Revolution, Bills of Attainder were used "with a most unsparing hand." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1338, at 211 n.3 (1833).

2. Rather than addressing the fundamental constitutional infirmity of the decision below, and despite the decision's breathtaking precedential implications, the Government argues primarily that this case has little "practical significance." Govt. Opp. 9. The Government notes that on Jan. 19, 1999 this Court denied review in *SBC Communications, Inc. v. FCC*, Nos. 98-652 and 98-653, *see* 119 S. Ct. 889, and suggests that "[n]othing has happened in the intervening weeks to make certiorari more appropriate now than it was then." Govt. Opp. 8.

But the denial of certiorari in *SBC* — which the Government admits did not involve the First Amendment question presented here, *see* Govt. Opp. 14 n.7[2] — does not establish whether review should be granted in this case. "The denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). This Court has frequently granted

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Each of the thirteen colonies adopted anti-loyalist legislation, typically citing such allegedly regulatory purposes as "public safety." *See* Alison Reppy, *The Spectre of Attainder in New York*, 23 ST. JOHN'S L. REV. 1, 22 (1948). *See also* John Hart Ely, Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 339 (1962) ("the primary purpose of some pre-Constitution bills of attainder was to prevent certain types of future conduct on the part of the individuals attainted"). For example, an infamous New York loyalty oath requirement of July 3, 1778 recited its purpose "more effectually to prevent the mischiefs arising from the influence and example of persons of equivocal and suspected character." James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 147, 153 (1908). In 1789, having experienced such legislative excesses firsthand, the framers — unanimously, *see* James Madison, DEBATES IN THE FEDERAL CONSTITUTION OF 1787, at 449 (Hunt & Scott eds. 1920) — moved to ensure that they should never recur.

[2] Notably, the long distance incumbents decline to defend Section 274 under the First Amendment. *See* MCI/AT&T Opp. 1 n.1.

certiorari to resolve an important legal question even in the absence of a circuit conflict and even after denying certiorari on the same issue not long before.[3]

If anything, the Fifth Circuit's decision underscores the need for review here. The Fifth Circuit and the D.C. Circuit disagreed over the meaning of the Bill of Attainder Clause and related separation of powers principles. The D.C. Circuit premised its holding on the assumption that Section 274 could be analyzed "apart from its specific targeting aspect." App. 14a. By contrast, the Fifth Circuit grounded its decision on what it termed a "prophylactic exception" to the Bill of Attainder Clause: "a properly crafted prophylactic measure [can] survive attainder analysis, even where the finding of a propensity for future conduct was based solely on past acts, and the result was a bar from future employment." *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 237 (5th Cir. 1998).

Both the Fifth and D.C. Circuits expressed uncertainty as to the proper construction of the Bill of Attainder Clause. The Fifth Circuit bemoaned that, "[l]ike a Christmas pie," this Court's

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[3] *See, e.g., Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2144 n.4 (1998) (granting review and reversing, despite the absence of a circuit conflict and despite the denials of cert. on same issue in 1995, 1996, and 1997); *Cohen v. de la Cruz*, 118 S. Ct. 1212, 1216 (1998) (granting review despite previous denials of cert.); *Bailey v. United States*, 516 U.S. 137, 142 (1995) (same); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (granting review after denials of cert. in *Christophersen v. Allied Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (*per curiam*), *cert. denied*, 503 U.S. 912 (1992), and *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (6th Cir.), *cert. denied*, 506 U.S. 826 (1992)). *See also National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 118 S. Ct. 927, 933 & n.2 (1998) (granting cert. despite agreement between circuits, "[b]ecause of the importance of the issues presented"); *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (granting review, and reversing, in separation of powers case despite absence of a circuit split).

opinions "provide a little something for every taste." 154 F.3d at 247 n. 30. The court described its analysis as a "sinuous journey" through the "diverse expressions and applications" of the Bill of Attainder Clause in this Court's cases. *Id.* Similarly, the D.C. Circuit in the decision below acknowledged that "it is not clear whether the specificity requirement retains any real bite" (App. 7a) and confessed uncertainty as to the meaning of this Court's decision in *United States v. Brown*, 381 U.S. 437 (1965). *See* App. 8a-9a. Not surprisingly, lengthy and vociferous dissenting opinions were filed both in the Fifth Circuit and in the decision below.

By itself, such overt confusion in two Circuits regarding the proper interpretation of this Court's decisions, accompanied by divergent application of those decisions, would warrant review. When the issue involves a fundamental question about a structural limit to congressional power, the need for certiorari is imperative. *Cf. Clinton v. City of New York*, 118 S. Ct. 2091, 2108-09 (1998) (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends the convenience of the moment.").

3. The Government and the long distance incumbents argue that review is unwarranted because Section 274 contains a sunset provision effective Feb. 8, 2000. *See* 47 U.S.C. § 274(g)(2). But if review were granted in this case, it would be set for argument well before Feb. 2000, most likely in Oct. 1999. This Court should not leave unreviewed a demonstrably incorrect decision by a Court of Appeals on an important issue of federal constitutional law simply on the speculation that it would be unable to issue a decision prior to the sunset provision's trigger date. An unconstitutional four-year jail term should not escape this Court's review merely on the Government's conjecture that the victim would be released from prison prior to the issuance of this Court's opinion.

Moreover, the effects of Section 274 will not disappear on Feb. 8, 2000. Section 274(e) creates a private right of action

against the BOCs, enforceable under 47 U.S.C. §§ 206 and 207, for alleged violations of Section 274. Private plaintiffs would no doubt contend that Section 274(g)(2), which provides that Section 274 "shall not apply to conduct occurring after" Feb. 8, 2000, does not extinguish a BOC's liability for damages based on conduct occurring prior to the sunset date. The Government would likely take a similar view in any proceeding to enforce the penal provisions of 47 U.S.C. §§ 501-03.

Any suggestion that BellSouth has slept on its rights (MCI/AT&T Opp. 10 n.7) is offensive and untrue. BellSouth has acted expeditiously at every turn, and the primary reason that this case was not presented earlier to this Court is a series of delays wholly outside of BellSouth's control. Section 274 was signed into law on February 8, 1996, but the FCC took over a year to promulgate its implementing rules. Once the rules were adopted, BellSouth filed its petition for review a mere eight days after a synopsis of the Order was published in the Federal Register. *See* 62 Fed. Reg. 7690 (Feb. 20, 1997). The case was not argued until a year later (Feb. 20, 1998). After the D.C. Circuit's decision issued, BellSouth promptly sought rehearing and filed its petition for certiorari in this Court almost a month before it was due. Indeed, it is ill-fitting for the Solicitor General to plead the passage of time as a reason for denying review, when he sought and received from this Court a two-month extension of time for the filing of the Government's brief in opposition to certiorari.

4. The remainder of the arguments against certiorari are makeweight and largely anticipated in the Petition. The Government argues that Section 274 is a mere structural separation rule. *But see* Petition for Certiorari ("Pet."). at 21-22. Section 274 is a complete ban on the ability of a BOC or its affiliates to provide electronic publishing through its telephone network in its local service area. *See* Pet. at 21-22. It would be as though the WASHINGTON POST were prohibited from publishing except through another member of its corporate

family (say, NEWSWEEK), outside the POST's editorial control. With a one-year grace period (Section 274(g)(1)), Section 274 effectively forced the BOCs to discontinue electronic publishing services that they had been lawfully able to provide for five years prior to 1996, with no evidence of anticompetitive harm.

Respondents half-heartedly defend the "rationality" of targeting the BOCs by name in Section 274. But respondents are wrong on the facts (*see* Pet. at 19-20) and wrong on the law. Even if the distinction drawn by Congress were rational, it would amount to an impermissible trial by legislature. *See Brown*, 381 U.S. at 449 n.23, 450 n.24.

Respondents maintain that collateral benefits in the 1996 Telecommunications Act outweigh any punitive effect of Section 274 on the BOCs. *But see* Pet. at 22 n.13. The suggestion that the BOCs supported the Special Provisions targeting them by name is both untrue[4] and legally irrelevant. *See New York v.*

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[4] The BOCs emphasized that they *opposed* special rules applicable to them alone. Submissions by Laurence Tribe and the American Civil Liberties Union contended that such measures were unconstitutional. *See* H.R. Rep. No. 102-850, 102d Cong., 2d Sess. 88 (1992). The BOCs testified that singling them out would be "wrong, anti-competitive, counterproductive, and anti-consumer." *Communications Law Reform: Hearings before the Subcomm. on Telecomm. and Fin. of the House Comm. on Commerce*, 104th Cong., 1st Sess. 30 (1995) (statement of Edward E. Whitacre, Jr. of SBC); *id.* ("this bill needs to clearly state that all regulatory, legislative, and judicial barriers to entry into all markets are being lifted at the same time"). *See also S. 1822, The Communications Act of 1994: Hearings before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 2d Sess. 144 (1994) (testimony of James Cullen of Bell Atlantic) (safeguards "are meant to apply to local exchange providers, whether they are independents or RBOCs"). BOC statements in favor of the legislation were simply recognitions that the restrictions imposed by Congress on the BOCs could have been worse. *See* Hearings on H.R. 3626, *Antitrust and Communications Reform Act of 1993*, Subcomm. on Economic and Commercial Law of the House

United States, 505 U.S. 144, 183 (1992) ("That a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation.").

II. Section 274 Violates the First Amendment.

1. The Government argues that Section 274 is not subject to strict scrutiny as a speaker-specific, content-based ban on speech because Congress did not target the BOCs due to "any particular message they might convey." Govt. Br. 15. But an inquiry into motive is misplaced. In *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), for example, this Court acknowledged that "there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications." *Id.* at 429. Nonetheless, this Court found the city's "mens rea" irrelevant. *Id.*; *see also Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). Nor can Section 274 be justified on the basis of alleged "bottleneck monopoly power," Govt. Opp. 15, because the statute was not written to apply to all LECs with such alleged power. *See* Pet. 25 n.15.

The Government attempts to repackage Section 274 as a "market-based" restriction, but it is forced to admit that "one must examine whether the information that the BOC proposes to

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Comm. on the Judiciary, 103d Cong., 2d Sess. 152 (1994) ("While H.R. 3626 may eventually remove barriers between consumers and new products and services, it unnecessarily delays this process. In addition, it removes some Bell information services freedoms already gained through the court of appeals. It places Bell manufacturing operations under Department of Justice oversight, *unlike any other American company*. But given the choice between these compromises and continued stalemate, we will take the compromises . . . .") (statement of Edward E. Whitacre, Jr.) (emphasis added).

transmit is one of the types of information listed in the statute's definition of 'electronic publishing.'" Govt. Opp. 16. Thus, the ban in Section 274 is content-based "by any commonsense understanding of the term," *Discovery Network*, 507 U.S. at 429, because it operates according to the substance of what the speaker wishes to say. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 232 (1987) (market-based definition was content-based because "enforcement authorities must necessarily examine the content of the message that is conveyed") (citation omitted).

2. The Government maintains that Section 274 can survive intermediate First Amendment scrutiny. But the Government cannot supply anything but "mere speculation and conjecture" to support that claim. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). The only *evidence* in the record proves that there were no signs of anticompetitive harm in the electronic publishing market prior to the entry of the AT&T consent decree. *See United States v. Western Elec. Co.*, 900 F.2d 283, 289, 307 (D.C. Cir.) (*per curiam*), *cert. denied*, 498 U.S. 911 (1990). The information services restriction was lifted in 1991 based on a well-documented showing by the BOCs, DOJ, and the FCC that BOC entry posed no substantial competitive risks and indeed would *benefit* consumers. This conclusion was supported by the National Telecommunications and Information Administration, the National Association of Regulatory Commissioners, numerous state commissions, consumer and public interest groups, and expert economists, including two Nobel laureates. *See* Pet. 6. The Court of Appeals, in approving removal of the restriction, held that the evidence supporting removal was so strong "that any district court rejection of the proposed modification would have been reversible error" and any findings that "contradict[ed] the Department's conclusions [would have been] clearly erroneous." *United States v. Western Electric Co.*, 993 F.3d 1572, 1578 (D.C. Cir.), *cert. denied*, 510 U.S. 985 (1993).

The Government offers only two slender reeds to support Section 274: the 1982 speculation of Judge Harold Greene that the information services ban might protect against anticompetitive practices, and self-serving testimony by would-be competitors of the BOCs urging Congress to exclude the BOCs from the market. Govt. Opp. 18-19. This is no evidence at all. Judge Greene's conjecture was based on theory, not factual findings; was offered prior to the FCC's development of an elaborate system of regulatory safeguards; and was disproven by subsequent events, as the D.C. Circuit held in 1993. The congressional testimony cited by the Government is meaningless in light of Congress' own finding (studiously ignored by the Government) that independent information service providers were "thriving" in 1994, three years *after* the BOCs were permitted to enter that market. H.R. Rep. No. 103-559(II), 103d Cong., 2d Sess. 25 (1994).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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